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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 862

PERCY C. MAGNUS, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Percy C. Magnus prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 20, 1966, in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 365 F. 2d 1007. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1966. A timely petition for rehearing *en banc* was denied on October 14, 1966. On November 2, 1966, Mr. Justice Harlan signed an order extending the time for filing this petition for writ of certiorari to and including December 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for a wilful failure to pay federal income taxes in violation of 26 U.S.C. § 7203, a jury verdict of guilt must be set aside where (a) the jury was charged, in language that departed from this Court's opinion in *Spies* v. *United States,* 317 U.S. 492, 498, that the wilfulness necessary to a § 7203 violation involves "a failure with an evil motive, a want of justification in view of all the financial circumstances of the taxpayer," and (b) the jury was thereby not advised that the critical element of wilfulness under § 7203 is an evil motive.

2. Whether the principles and rationale of *Sansone* v. *United States,* 380 U.S. 343, require the acquittal of a taxpayer charged with and found guilty of the misdemeanor of wilful failure to pay federal income taxes, in violation of 26 U.S.C. § 7203, where (a) the taxpayer has been charged with and found innocent of the felony of wilfully attempting to evade those taxes in violation of 26 U.S.C. § 7201, and (b) the same proof encompassed both the misdemeanor and the felony charges and the only disputed matters with reference to the alleged felonious acts of evasion concerned inferences and conclusions to be drawn from conceded facts.

3. Whether, in a criminal trial in a federal court, the trial judge may refuse to change or amend an improper charge, a timely exception thereto having been taken pursuant to Rule 30 of the Federal Rules of Criminal Procedure, because of the failure of defense counsel to anticipate the improper instruction and to submit a written request for a proper instruction prior to the jury charge.*

STATUTORY PROVISIONS INVOLVED

Title 26, United States Code, Section 7201:

> *Attempt to evade or defeat tax*
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years or both, together with the costs of prosecution.

Title 26, United States Code, Section 7203:

> *Willful failure to file return, supply information, or pay tax*
>
> Any person required under this title to pay any . . . tax, or required by this title or by regulations

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* Petitioner reserves the right to brief and argue the following additional question in the event that certiorari is granted herein:

4. Whether, in the trial of a taxpayer accused of wilful failure to pay federal income taxes in three specified years, the admission of a mass of contradictory evidence concerning the taxpayer's record as to filing returns and paying taxes in earlier and unrelated years, relative to both federal and state income tax obligations, was unduly prejudicial.

made under authority thereof to make a return (other than a return required under authority of Section 6015 or section 6016), . . . who willfully fails to pay such . . . tax, make such return, . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner Percy C. Magnus was charged, in a nine-count indictment, with certain felonies and misdemeanors respecting his federal income tax obligations for the years 1955, 1956 and 1957. More specifically,

(1) Counts 1, 4 and 7 charged petitioner with the felony of attempting to evade and defeat a large part of his income tax for each of the three years in question, in violation of § 7201 of the Internal Revenue Code (26 U.S.C. § 7201). The attempts to evade allegedly took the form of (a) "failing to make said income tax return", (b) "failing to pay said income tax", and (c) "concealing and attempting to conceal from all proper officials of the United States of America the true and correct gross and net income of himself and his said wife". App. 9a, 11a, 13a.

(2) Counts 2, 5 and 8 charged petitioner with the misdemeanor of wilfully failing to file tax returns for each of the three years, in violation of § 7203 of the Internal Revenue Code (26 U.S.C. § 7203).

(3) Counts 3, 6 and 9 charged petitioner with the misdemeanor of wilful failure to pay his federal in-

come taxes for the same three years, in violation of § 7203 of the Internal Revenue Code (26 U.S.C. § 7203).

Following a three-week trial on all nine counts, the jury on June 29, 1965, returned a verdict of not guilty on the counts described in (1) and (2) above and a verdict of guilty as to three counts described in (3) above. Upon this finding of guilt as to the misdemeanor of wilful failure to pay federal income taxes for the three years involved, petitioner was sentenced to a term of six-months imprisonment on each of the three counts, the sentences to be served concurrently. Motions for a judgment of acquittal and for a new trial were denied. On appeal, the Second Circuit affirmed the conviction.

The relevant facts underlying this conviction may be briefly stated. Petitioner is the president and principal stockholder of a corporation known as Magnus, Mabee & Reynard, Inc., which is in the business of manufacturing essential oils and aromatic chemicals. During the indictment years, 1955-1957, about 150 people were employed by this firm and the volume of business was such that petitioner was forced to devote virtually his full time to the firm's affairs, supervising the whole organization in general and the sales and purchasing departments in particular. Little time was left for his own personal affairs. App. 1671a-1687a.

Petitioner accordingly delegated to others the authority to manage his personal business affairs. Among the matters so delegated was that concerning his personal income tax returns and payments. The returns were prepared by F. C. Cummings, the comptroller of

the firm, and the payments were made from petitioner's personal bank accounts by George McGlynn, the treasurer of the firm who was acting under a power of attorney from the petitioner.

Cummings would thus prepare federal income tax returns from all the written information available to him, including the W-2 withholding tax forms and the Form 1099 information returns.[1] He would then submit the returns to petitioner for signature. Upon being assured by Cummings that "everything is O.K.", petitioner would sign the returns and give them back to Cummings for mailing. App. 1695a-1698a, 1750a-1752a. Cummings additionally had responsibility for handling any audits by Internal Revenue agents of petitioner's personal and corporate tax returns and acted under instructions from petitioner to cooperate and give any information requested by those agents. App. 1705a-1706a.

Having had faith in the competence and honesty of Cummings and McGlynn, petitioner testified as to his belief that they had seen to it that his federal income tax returns were filed and that his taxes for the years in question were properly paid. App. 945a-946a, 1773a-1788a. He fully believed that checks in payment of the amounts owed on taxes, less the amounts withheld, had been paid by McGlynn under the power of attorney on

[1] Petitioner knew that the corporation filed W-2 forms with the Internal Revenue Service, reflecting his salary for each year. He also knew that certain banks and stock companies issued Form 1099 information returns to the Government, reflecting petitioner's total dividends and fees received as director or trustee; copies of those returns were mailed to petitioner. App. 1689a. The total income reflected by these forms for the three years in question exceeded the taxable net income reflected in the indictment. App. 1806a.

the basis of the returns prepared and filed by Cummings. App. 1484a-1485a, 1682a, 1694a. If there were insufficient funds in his personal accounts to take care of such personal taxes, Cummings or McGlynn had authority to draw upon the corporate funds to cover the personal tax obligations. App. 1699a-1700a.

Cummings suddenly resigned from the firm in 1958 at the point when Revenue Agent Blatt came in to audit the corporate return for 1956. App. 1706a. Cummings gave as the reason for his resignation the belief that the employment of petitioner's nephew in the business meant that Cummings could advance no further in the firm. App. 1707a. It was only after Cummings' departure that petitioner learned that Blatt had requested Cummings to produce checks showing payment of the taxes. Upon learning of that request, petitioner immediately asked McGlynn to give Blatt the requested material. App. 1717a-1718a.

McGlynn testified that his own search failed to uncover any cancelled checks for federal income taxes for the year 1956, the year petitioner had mentioned to him in making the request. App. 1456a-1458a. Sometime later McGlynn finally managed to communicate with Cummings by phone to ask about the checks and the returns. Cummings replied that all the returns for the years 1955-1957 had been filed but that not all the payments had been made. App. 1459a. McGlynn further testified that it had been customary for Cummings to prepare the checks for the payment of petitioner's income taxes and that Cummings at one point had advised him that the checks for payment of the federal income taxes "were taken care of".[2] App. 1453a.

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[2] Cummings conceded that he had made such a statement to McGlynn. App. 664a.

Moreover, according to petitioner (App. 1714a-1715a), Cummings later advised petitioner, through letters sent to the firm's attorney, that all the personal income tax returns had been filed.

Nevertheless, Special Agent Biskup—who had been assigned to the case in 1959—claimed that none of petitioner's returns were on file. Petitioner accordingly authorized his accounting firm and his attorney to file returns in September of 1959 relative to the years 1951 to 1957; a year later returns for the years 1948 to 1951 were filed. App. 1715a-1716a. On these occasions, petitioner paid the correct taxes for the years involved, plus interest. App. 948a, 1109a-1110a. Two years later petitioner was indicted on the instant charges.

The main prosecution witness was Cummings. He testified that at all times he had filed petitioner's federal income tax returns and had so advised all Government agents, the prosecutors and the grand jury. App. 666a-679a, 699a-701a. He stated that it would have been sheer nonsense not to have done so in view of the information already on file with the Government. App. 752a, 755a. But he denied that he had ever discussed the tax returns with petitioner except to say to him that they were in order and to have petitioner sign them. His only responsibility, Cummings said, was to see that the returns were prepared, executed and mailed, although he conceded that he did draw checks for payment of petitioner's New York state income taxes. App. 527a, 680a. He did not enclose checks in payment of the balance of the federal taxes due, and assumed that they were routinely paid. App. 681a. And he further stated that he had shown the retained copies of petitioner's returns to Agents Blatt and Daar when requested on occasions when they were auditing

the corporate returns, having done so with petitioner's permission. App. 479a-500a. Cummings showed retained copies of the returns to the agents as evidence that the originals had been filed and that the taxes had been paid. That action by Cummings in showing the retained copies, action which was uncontested by the defense, was the critical "affirmative act of evasion" relied upon by the Government in its prosecution of the § 7201 felony charges.[3]

Cummings conceded that he had misrepresented to petitioner and others that he was a certified public accountant. App. 721a-724a. And with reference to his resignation in 1958 in the midst of Agent Blatt's insistence on seeing the checks in payment of the 1956 taxes, Cummings admitted that he had concealed this inquiry from petitioner and obtained from petitioner a letter of recommendation before petitioner became fully aware of his tax difficulties. App. 1707a-1713a. Cummings also testified that he had been very nervous prior to his resignation and felt that everyone had been spying on him and everyone else in the firm. App. 718a-720a. At his subsequent job, he was reprimanded for misrepresenting his status as a certified public accountant and was eventually asked to leave after discovery of irregularities by him in the petty cash expenditures. App. 1192a-1193a, 1205a.

The Government placed in evidence the ledger sheets from petitioner's personal bank accounts for the years

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[3] In its brief in the Court of Appeals below, the United States stated at p. 17 that "The affirmative acts of evasion alleged by the Government concerned the displaying of file copies of appellant's 1954, 1955 and 1956 income tax returns to Revenue Agents who were conducting audits of MMR's corporate returns for those years."

1955 to 1958, pertaining to the periods from February through June, to indicate that petitioner did not have sufficient balances at those times to pay his taxes; in fact, on several occasions his accounts had been overdrawn. App. 530a-532a, 785a, 552a-555a. Presumably this was done to show a motive for the alleged failure to pay the taxes. But to counteract this evidence, the defense showed that petitioner always had sufficient cash available through use of the corporate funds as advances to him whenever his personal accounts required replenishment; in addition, he had substantial personal security holdings and unlimited financial credit at his banks. App. 1413a-1418a, 694a. Indeed, the Government stipulated that the fair market value of his marketable securities as of April 15 in 1956, 1957 and 1958 $265,000, $260,000 and $220,000, respectively. App. 1106a. The corporation itself had cash and marketable securities on those dates, in excess of immediate needs, of $337,000, $373,000 and $529,000, respectively. App. 1382a-1387a. Upon this showing of ability to pay, the Government abandoned its earlier position and made no mention in its summation to the jury of any financial inability of petitioner to pay his taxes.

Over repeated objection, the Government was permitted to introduce a mass of contradictory evidence with respect to petitioner's federal returns and taxes for the earlier years 1948 through 1954 and with respect to his New York state returns and taxes for the years 1946 through 1952. This evidence, admitted on the theory that it was relevant in assessing petitioner's wilfulness in failing to pay the federal taxes in 1955, 1956 and 1957, was extensively commented upon by the trial judge in his charge to the jury. App. 1974a-1975a, 1979a-1983a, 1990a-1991a.

With respect to the evidence of late filing of petitioner's federal tax returns for the three years in question and of the late payment of the taxes for those years, the Government's position was that the subsequent payments should be interpreted by the jury as indicative of the petitioner's guilty knowledge. See Government's Request No. 23, App. 2074a. But the petitioner's counsel argued to the jury, without objection, that such evidence showed petitioner's good faith in paying the taxes when the matter was first brought to his attention. App. 1912a. Then the trial judge, after announcing that his final charge would constitute a ruling on all requests, proceeded to instruct the jury that the evidence as to these subsequent payments "is not a defense to the charge contained in these counts." App. 1987a. Petitioner's counsel objected immediately, pointing out that the court should charge the jury that "filing a return, even though late in the payment of tax, is in fact evidence which they may consider for the purpose of determining whether there was wilfulness in the first place, evidence favoring the defendant as showing a lack of wilfulness even though the return was filed late and the tax paid late." App. 2007a-2008a. The judge refused to modify the charge.

In charging and recharging the jury on the misdemeanor counts as to which petitioner was found guilty, the judge made it plain (App. 1987a-1988a, 2048a-2049a) that

> ". . . the only issue for you to decide is whether or not defendant's failure to pay the tax at the time that it was due was wilful. As I have said, a wilful failure means a conscious, deliberate and purposeful failure as opposed to an unconscious, unwilling, negligent or mistaken failure. However, . . . there must be something more than a

> conscious, deliberate and purposeful failure in order to constitute wilfulness. *There must be a failure with an evil motive, a want of justification in view of all the financial circumstances of the taxpayer.*" [Emphasis supplied.]

Petitioner's counsel promptly objected to this portion of the charge (App. 2006a):

> "MR. BENDER: We except to that portion of your charge, your Honor, which in discussing the issue of wilfulness, in defining wilfulness on the payment of taxes, you indicated that there must be an evil motive or want of justification. We think it is correct when you charge evil motive, but when you say 'or want of justification'—
>
> "THE COURT: I said a want of justification. That is a direct quotation from the Spies case, an evil motive, a want of justification."

And a few minutes later, in summarizing all his objections to the charge, petitioner's counsel repeated (App. 2010a) that

> "We take exception to your Honor's charge with regard to wilfulness on the failure to pay taxes. We think that in addition to a conscious knowledge that a tax is due the evidence must show a wrongful intent to evade the tax as distinguished from a mere want of justification."

Finally, with respect to the wilfulness issue, the trial judge repeatedly instructed the jury that it could consider any and all evidence that it deemed relevant, without limitation as to the particular counts involved. Thus with respect to the § 7203 failure to pay counts as to which petitioner was ultimately convicted, the jury was charged that "In determining whether or not

defendant's failure to pay the federal income taxes for the years 1955, 1956 and 1957 on or before their respective due dates was or was not wilful, you may consider all the evidence that you believe to be relevant on that issue." App. 1988a. And this was among the charges repeated at the jury's request. App. 2049a.

Similarly, the jury was told as to the § 7201 felony charges that "You may consider in determining the defendant's guilt or innocence on this count all the evidence that you deem relevant." App. 1996a. And the instruction respecting the § 7203 failure to file counts read: "In determining whether or not any failure to file a return for those years, if you find that there was such a failure, was wilful, you may consider all the evidence that you believe to be relevant on that issue." App. 1978a.

Following these various instructions, the jury retired at 3:55 p.m. on June 28, 1965, to begin its deliberations. Those deliberations continued until 11:00 p.m. that evening and resumed again on the following morning, June 29. At 11:25 a.m. on June 29, the jury requested the court to repeat the instructions on the misdemeanor charges only. App. 2029a. The judge proceeded to repeat his earlier charges respecting the failure to pay and the failure to file portions of the indictment, omitting the previous instructions as to the felony allegations. He thus reiterated to the jury that, under the failure to pay counts, "the only issue for you to decide whether or not defendant's failure to pay the tax at the time it was due was wilful . . . there must be something more than a conscious, deliberate and purposeful failure in order to constitute wilfulness. *There must be a failure with an evil motive, a want of justification in view of all the financial circumstances*

of the taxpayer." [Emphasis supplied.] App. 2048a-2049a.

After these charges had been reread, the jury retired at 12:05 p.m. on June 29 to resume its deliberations. Twenty minutes later, at 12:25 p.m., the jury returned with its verdicts—guilty as to the failure to pay misdemeanor counts, innocent as to the failure to file misdemeanor counts, and innocent as to tax evasion felony counts.

In affirming this conviction on the failure to pay counts, the Second Circuit made the following determinations:

(1) The petitioner was not harmed by the trial judge's departure from the *Spies* rule that wilfulness must "include some element of evil motive *and* want of justification in view of all the financial circumstances of the taxpayer." *Spies* v. *United States,* 317 U.S. 492, 498 (emphasis supplied). As spoken, the judge's statement—which inserted a comma in place of the word "and"—may well have conveyed to the jurors, said the Second Circuit, "a conjunction rather than a disjunction between 'an evil motive' and 'a want of justification.'" And, said the court, the words "an evil motive" stood first in the judge's statement. The court also stated that if the defense thought the departure was material it had the duty to inform the judge that *Spies* had not been quoted exactly. Appendix, pp. 5a-6a, *infra.*

(2) Petitioner's acquittal on the felony counts did not require acquittal on the failure to pay counts under the rationale of *Sansone* v. *United States,* 380 U.S. 343. There was a disputed factual element in this case, the existence of affirmative acts of evasion, which re-

lated only to the felony counts and which served to distinguish the elements of the misdemeanor counts. If petitioner had been prosecuted only for the felony, he would have been entitled to a lesser-included offense instruction under the *Sansone* standard that "a lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." 380 U.S. at 350. The Second Circuit thus thought it unnecessary to decide whether the prosecution should have been allowed to go to the jury on both the felony and the misdemeanor counts. The court also mentioned that the petitioner had made no motion to compel the Government to elect between the felony and the misdemeanor counts. Appendix, pp. 3a-5a, *infra*.

(3) The trial judge's refusal to modify his charge that the evidence respecting late payment of the taxes in question "is not a defense to the charge contained in these counts" was held to be well within the judge's discretion. Since petitioner had not asked prior to the charge for an instruction that such evidence might be considered in determining wilfulness and since the judge did in fact charge the jury that it might consider all evidence before it which it believed to be material on the issue of wilfulness, the Second Circuit found no error in the judge's refusal to amend the charge. Appendix, p. 6a, *infra*.

(4) The vast amount of evidence introduced concerning petitioner's federal tax returns and payments for years other than those in question, as well as the evidence concerning his New York state tax returns and tax payments, was held properly admitted to show wilfulness. Appendix pp. 6a-7a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The decision below approves a standard of wilfulness in conflict with that established by this Court and followed by other Circuits.

The Second Circuit has here approved the trial judge's charge to the jury that the wilfulness essential to a conviction under 26 U.S.C. § 7203 for wilfully failing to pay one's income tax involves "a failure with an evil motive, a want of justification in view of all the financial circumstances of the taxpayer." This standard is directly contradicted by the applicable decisions of this Court and of other Circuits.

Initially, the charge to the jury, which was repeated at the jury's request, misquoted and distorted the meaning of this Court's language in *Spies* v. *United States*, 317 U.S. 492, 498. With reference to the wilfulness involved in the misdemeanor of wilfully failing to pay an income tax under the predecessor of § 7203, the Court there said that "We would expect willfulness in such a case to include some element of evil motive *and* want of justification in view of all the financial circumstances of the taxpayer." [Emphasis added.] The elements of evil motive and want of jurisdiction were thus put in conjunction by this Court.

The jury charge, purportedly based upon that language,[4] substituted a comma for the conjunctive word "and" between the phrases "evil motive" and "want

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[4] Upon petitioner's objection to the charge, the trial judge remarked that he had given "a direct quotation from the Spies case, an evil motive, a want of justification." App. 2006a. He thus repeated the significant omission of the conjunctive "and" between the two elements of "an evil motive" and "a want of justification."

of justification in view of all the financial circumstances of the taxpayer." Such a substitution completely altered the relationship between the two elements mentioned in *Spies* from one of conjunctiveness to one of appositiveness. In other words, a "want of justification" became the equivalent of, or a definition of, an "evil motive"—directly contrary to the plain meaning of this Court's statement in *Spies*.[5]

The Second Circuit sought to cure the patent misquotation by the unwarranted and unprovable assumption that "since the words 'an evil motive' stood first" in the charge and "since the sentence as spoken may well have conveyed to the jurors a conjunction rather than a disjunction between 'an evil motive' and 'a want of justification,' we are not convinced that the charge as given could have harmed appellant."[6] It is both questionable and dangerous to speculate from outside the record that twelve jurors "may well have" heard

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[5] In *Spies*, this Court's use of the conjunctive "and" made each of the two elements—an evil motive and a want of justification—a separate and distinct part of the concept of wilfulness. But the trial judge's substitution of a comma put those two elements in apposition, one standing as the equivalent of the other.

A simple example illustrates the vital change made by the trial judge's misquotation. The conjunctive phrase "John and the tax evader" refers to two separate people, both John and the tax evader. But the use of the appositive phrase "John, the tax evader" changes the reference so that John is the one identified as the tax evader.

[6] But the grammatical problem is not one as between a conjunction and a disjunction. Rather it is one between a conjunction and an apposition. See footnote 5, *supra*. To continue the example given in footnote 5, a disjunction would exist in the phrase "John or the tax evader"—which refers either to John (whose status is not mentioned) or another person identified as the tax evader.

the critical sentence other than as it appears and reappears in the transcript. By virtue of what the record shows was actually said to the jurors, they may well have thought that wilfulness could be predicated solely on the element of a want of justification on petitioner's part for not paying his taxes—particularly in view of the evidence that petitioner was a man of means with sufficient funds available to pay his taxes. Therein lies the real harm to petitioner, the possibility that the jury may have convicted him on an unsupportable theory of wilfulness. See *Yates* v. *United States,* 354 U.S. 298, 312 (a jury verdict must be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected").

This very real possibility of harm is heightened by the fact that the jury was obviously troubled by the misdemeanor charges and requested that the instructions thereon be repeated. Once those instructions were reread—including the erroneous departure from the *Spies* ruling as to wilfulness—the jury quickly found the petitioner guilty on the failure to pay counts. This Court has observed that as to any instruction given a jury "It must be presumed that the jury conscientiously observed it." *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 367. By reason of that presumption, the jury must have found the petitioner guilty by conscientiously following the *Spies* misquotation and equating evil motive with a want of justification. As noted in *Bollenbach* v. *United States,* 326 U.S. 607, 612, "Particularly in a criminal trial, the judge's last word

is apt to be the decisive word." The harm to petitioner is obvious.[7]

Indeed, the prominence and emphasis given by the trial judge to the "want of justification" element, equated as it was to the "evil motive" element, can only serve to underscore the more basic conflict between the decision below and the relevant decisions of this Court and of other Circuits concerning the proper standard of wilfulness. Not even the Second Circuit's rewriting of the trial judge's erroneous charge can erase the fact that the jury was not instructed, as such other decisions have insisted, that the critical and main element of wilfulness is an evil motive, i.e., a specific wrongful intent to evade the obligation to pay taxes.

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[7] The Second Circuit's comment that it was "incumbent upon the defense, if it thought the departure from the *Spies* standard material, to inform the trial court that *Spies* had not been quoted exactly" overlooks the fact that the defense twice excepted vigorously to this portion of the charge:

(1) The first prompt exception came at the end of the charge. App. 2006a. Counsel apparently heard the purported *Spies* statement as containing the disjunctive "or" between the two elements mentioned in *Spies*, for he claimed error to the extent that "you indicated that there must be an evil motive or want of justification . . . it is correct when you charge evil motive, but when you say 'or want of justification'—." App. 2005a.

(2) In summarizing his exceptions, petitioner's counsel repeated the foregoing exception with regard to wilfulness, stating his claim "that in addition to a conscious knowledge that a tax is due the evidence must show a wrongful intent to evade the tax as distinguished from a mere want of justification." App. 2010a.

In any event, it is unreasonable to expect counsel to have the *Spies* opinion before him, an opinion not mentioned in any of the relevant requests, to check the judge on the correctness of his unanticipated efforts to give verbatim quotations therefrom. It is enough if proper exceptions are taken, as they were here.

The whole notion of wilfulness in this setting is one that focuses upon just such an evil motive or wrongful intent or bad faith. It is a requirement that is not satisfied by evidence of a want of justification for failure to pay the tax or to do some other act required by law. As stated in *United States* v. *Murdock,* 290 U.S. 389, 397-398, a failure or refusal to perform some act may be "intentional and without justification, but the jury might nevertheless find it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."[8] And when the *Spies* opinion referred to the "want of justification" element it was not intended as a substitute for or as an equivalent of the essential element of evil motive, which alone constitutes wilfulness under § 7203. *Spies* was designed in no way to alter or reverse the *Murdock* rule that where evil motive is made the heart of wilfulness in a statutory offense, any lack of justification for the act or omission becomes a secondary consideration.[9] See also *Screws* v. *United States,* 325 U.S. 91, 101-103; *James* v. *United States,* 366 U.S. 213, 242-244 (separate opinion of Mr. Justice Harlan).

Other Circuits, when dealing with the requirement of wilfulness in the context of § 7203, have uniformly

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[8] The *Murdock* case dealt with a charge of wilfully refusing to answer questions put a taxpayer by revenue agents respecting matters in his federal income tax return. The refusal was based on the then unjustified notion that the answers might subject the taxpayer to prosecution under state law.

[9] "In *Spies* v. *United States* this Court had occasion to consider the quantum and type of evidence required to support a conviction for the substantive offenses of attempting to defeat or evade federal taxes as contrasted with the lesser proof required to convict of the misdemeanor of willfully failing to file a return or to pay a tax." *Ingram* v. *United States,* 360 U.S. 672, 676.

followed the *Murdock* rule. Thus the Third Circuit, in *United States* v. *Palermo,* 259 F. 2d 872, 880-881, ruled that an intentional default in the payment of income taxes "without justifiable excuse" or marked by "a careless disregard" or "a want of justification," neither singly nor cumulatively, was sufficient to establish wilfulness under what is now § 7203. Wilfulness under that statute, said the Third Circuit, requires an "evil motive" or a "specific wrongful intent" to avoid the obligation to pay taxes. To the same effect, see *Pappas* v. *United States,* 216 F. 2d 515, 519 (C.A. 10); *Edwards* v. *United States,* 321 F. 2d 324, 325 (C.A. 5), rev'd on other grounds, 334 F. 2d 360 (C.A. 5, *en banc*); *United States* v. *Pepe,* 209 F. Supp. 592, 594 (D. Del.), aff'd 339 F. 2d 264 (C.A. 3); see also *Abdul* v. *United States,* 364 U.S. 832 (notation of Mr. Justice Black and Mr. Justice Douglas).

The District Court in this case expressly refused to conform its charge to petitioner's requests, arguments and exceptions that the evil motive necessary under § 7203 was conduct evidencing a wrongful intent to evade the payment of petitioner's taxes and that "evil motive" was not a mere synonym of "a want of justification." App. 1825a-1829a, 2006a, 2010a, 2065a-2067a. It specifically refused, in other words, to follow the standard of wilfulness specified by the Third Circuit in *Palermo,* a standard grounded on this Court's decision in *Murdock.* The Second Circuit's affirmance of the District Court's charge, compounded as it was by an unwarranted revision of a misquotation from the *Spies* opinion, must be deemed to be in conflict with the *Murdock* principle and with the *Palermo* and related decisions dealing with § 7203.

The grant of certiorari is accordingly appropriate to resolve this conflict and to remove the undue confusion generated by the Second Circuit's treatment of an important and recurring principle in the administration of the criminal tax statutes of the United States.

2. The decision below is a departure from and in conflict with this Court's decision in Sansone v. United States, 380 U.S. 343.

The court below ruled that petitioner's "acquittal on the felony counts did not require acquittal on the failure to pay counts under the rationale of *Sansone* v. *United States,* 380 U.S. 343." Appendix, p. 3a, *infra.* But the rationale of *Sansone* was expressly premised upon "the facts of a given case." 380 U.S. at 351. And the relevant facts of this case make plain that the disputed issues submitted to the jury were identical as to both the felony and the misdemeanor counts. The *Sansone* rationale would thus require an acquittal as to the misdemeanor counts, given the jury's verdict of acquittal on the felony counts. The decision below must be viewed as inconsistent with *Sansone.*

The *Sansone* rationale may be briefly stated as follows:

(1) The elements of § 7201, which makes it a felony wilfully to attempt to evade a federal tax, are (a) wilfulness, (b) the existence of a tax deficiency, and (c) an affirmative act constituting an evasion or attempted evasion of the tax. In contrast, the misdemeanor specified in § 7203 of wilfully failing to pay a tax when due requires only (a) wilfulness and (b) a failure to pay the tax when due. Thus a § 7201 felony involves some wilful commission, some affirmative act of evasion, in

addition to the wilful omission that marks a misdemeanor under § 7203.

(2) Where, in a § 7201 prosecution, there is a disputed issue of fact as to the existence of an affirmative act of evasion, a jury could rationally find that, although all the elements of § 7201 have not been proved, all the elements of a § 7203 misdemeanor have been shown. In that event, the defendant is entitled to a lesser-included offense charge.

(3) But where the only disputed § 7201 issue is one of wilfulness, the affirmative act and the tax deficiency having been conceded, §§ 7201 and 7203 cover precisely the same ground and the defendant is not entitled to a lesser-included offense charge based on § 7203.

While *Sansone* involved only a § 7201 felony prosecution whereas the instant case involves both a § 7201 felony prosecution and a § 7203 misdemeanor prosecution, the governing principle of *Sansone* is the same in both instances. If the disputed issues of fact are the same under both charges so that § 7201 and § 7203 cover "precisely the same ground," *Berra* v. *United States,* 351 U.S. 131, 134, the jury cannot rationally find the defendant innocent of the felony charges without finding him innocent of the misdemeanor charges, or vice versa. An acquittal on one set of charges requires an acquittal on the other set.

In this case, the Second Circuit sought to find disputed issues of fact as to the felony charges that would permit the jury to distinguish between the felony and misdemeanor counts. It asserted that the existence of the affirmative acts of evasion required for a § 7201 felony was contested at the trial by the petitioner. But

the court's own opinion reveals that the only real dispute about the alleged affirmative acts of evasion concerned the inferences and conclusions to be drawn from certain conceded and undisputed facts—facts concerning the presentation by the corporate comptroller to revenue agents of file copies of petitioner's tax returns for the years in question and the general direction by petitioner that his employees cooperate with the revenue agents. The Government sought to have the jury conclude that the file copies thus submitted were false and that petitioner's direction to cooperate and his own belief that the returns had been filed and the taxes paid were not to be credited, thereby showing affirmative acts of evasion. See footnote 3, p. 9, *supra.* The petitioner, of course, sought to convince the jury that the opposite inferences and conclusions should be reached.

But differing inferences and conclusions to be drawn from undisputed facts cannot escalate the facts themselves into the category of "disputed issues of fact" within the meaning of *Sansone.* As was said by the Second Circuit on another occasion, *United States* v. *Markis,* 352 F. 2d 860, 867, "The mere fact that the jury was still free to disbelieve this portion of the agent's testimony does not elevate the issue to a truly 'disputed' one; in the language of the Model Penal Code § 1.07(5) (1962), it does not provide 'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'" Yet the Second Circuit in this case has attempted to accomplish the impossible, to create disputed issues of fact out of disputed inferences and conclusions. Such an effort, however misplaced, raises a serious question as to the meaning and efficacy of this

Court's rationale in *Sansone*. It is an effort which assuredly merits the considered attention of this Court.

The decision below, moreover, is at war with the basic philosophy and approach of the *Sansone* case. The plain import of that decision requires an acquittal as to misdemeanor charges involving facts identical to those underlying an acquittal on felony charges. In this case the Government relied upon the undisputed facts as proof of wilfulness in the misdemeanor counts as well as proof of the affirmative attempts to evade in violation of § 7201. Thus the lesser offense of wilful failure to pay, by the Government's own theory, was included within and "on the facts of the case . . . completely encompassed by the greater," *Sansone* v. *United States,* 380 U.S. at 350, so as to make it improper even to submit the misdemeanor counts to the jury. *Sansone* implicitly makes it improper.

Indeed, the Government indiscriminately used all of the facts developed at the trial in pursuit of both the felony and misdemeanor counts. So complete was the identity of the facts underlying these charges as to create a serious problem in the administration of the federal criminal tax statutes, a problem which Congress sought to avoid and which the Solicitor General of the United States once advised this Court would never arise.

In his brief to this Court in the *Sansone* case, No. 365, October Term, 1964, the Solicitor General represented that the prosecutorial policy of the Department of Justice since the 1957 decision of this Court in *Achilli* v. *United States,* 353 U.S. 373, was one that did not authorize "prosecuting under Section 7203 when an affirmative act of evasion is charged." Brief

for the United States, p. 19, fn. 4.[10] That policy was said to have been dictated by several compelling considerations:

(1) In enacting the criminal provisions of the 1954 Internal Revenue Code, Congress "intended no change from the prevailing policy that acts amounting to evasions of the income tax should be prosecuted and judged exclusively as felonies upon grand jury indictment." Brief, p. 16. Thus, "if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties." Brief, p. 19.

(2) There "is no feature of the 1954 Code which would justify an inference that Congress proposed to confer upon a jury sitting in a prosecution for the felony of tax evasion the special prerogative of reduc-

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[10] The full statement of the policy, as it appears at p. 19, fn. 4, of the Brief for the United States in the *Sansone* case, reads as follows:

> "The prosecutorial policy of the Department of Justice is in keeping with the views expressed above. Before *Achilli* v. *United States*, Section 3616(a) had been used in relatively few income tax evasion cases. When the government suggested to the Court in *Achilli* v. *United States* that Section 3616(a) was inapplicable to income tax evasions, it abandoned all prosecutions under that Section and undertook to redress punishments already administered. Since *Achilli*, the Department has authorized no prosecutions under either Section 3616(a) or Section 7207 of the 1954 Code. Nor does the Department authorize prosecuting under Section 7203 when an affirmative act of evasion is charged."

This footnote was appended to a textual statement reading: "To repeat, however, if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties."

ing the offense to a misdemeanor, albeit all the elements of the felony are proved." Brief, pp. 19-20.

(3) As both the House and Senate committee reports had emphasized, minimum penalties were omitted from the 1954 Code for felony offenses so that it would be "possible for the judges to better fix the penalties to fit the circumstances." Brief, p. 35. Thus "the trial judge, not the prosecutor, has complete discretion as to penalty under the 1954 Code" and there is no reason "to be concerned with possible constitutional objections which might be inherent in a scheme giving a federal prosecutor discretion as to the penalty to be imposed upon particular defendants." Brief, p. 35. In other words, the prosecutor cannot choose the penalty by arbitrarily deciding whether to prosecute the defendant for a felony or a misdemeanor.

The opinion of the Court in *Sansone* reflected these representations of the Solicitor General, and the Court was able to state with confidence that where felonious acts of evasion were charged neither the prosecutor nor the jury could invade the judicial function of determining the degree or extent of the punishment to be imposed. See 380 U.S. at 350, fn. 6.

The indictment in the instant case was pending in the Southern District of New York at the time the Solicitor General represented that it was no longer the policy of the Government, and had not been since 1957, to prosecute for both felony and misdemeanor offenses.[11] Thus the indictment and the prosecution

[11] The Second Circuit's suggestion that defense counsel should have moved before trial to compel the Government to elect whether to proceed on the felony or the misdemeanor counts cannot overcome the Government's violation of its own policy in seeking such an indictment and proceeding to the prosecution on all counts.

in this instance must reflect a conscious violation of the policy announced to this Court.

The instant indictment and prosecution also represent a departure from the legislative intent expressed in the penal sections of the 1954 Internal Revenue Code denying "to the prosecution an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone* v. *United States*, 380 U.S. at 350, fn. 6. The Solicitor General's brief in *Sansone* disclaimed such discretion on the prosecutor's part under the 1954 Code "if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, [since in that event] that section alone defines the offense and the penalties." Brief for the United States, p. 19. But the egregious evils which the Congress, this Court and the Department of Justice agreed should be avoided did in fact occur in this case—i.e., the prosecution in its unbridled discretion joined in the nine separate counts both felony and misdemeanor charges and utilized indiscriminately the same proof for the same years on all these counts.[12] Actually, under the announced policy of the Depart-

[12] The affirmative act of evasion in the felony counts, as alleged in the indictment and bill of particulars and as placed in evidence at the trial, was the showing to agents of the Internal Revenue Service of "retained copies" of petitioner's federal tax returns for the indictment years as proof to those agents that the originals had been filed and the income tax paid as stated thereon, when allegedly petitioner knew that the original returns had not been filed and the taxes had not been paid. Similarly, under the misdemeanor counts alleging a failure to pay the taxes, this same evidence was offered to show petitioner's wilfulness in that he allegedly knew that the "retained copies" of the returns shown to the agents did not accurately reflect payment of his taxes for the indictment years, as they purported to do. It was not contested by the petitioner that these "retained copies" were shown to the agents.

ment of Justice, there should have been only the three felony charges. Thus the prosecution, by its discretionary multiplication of charges, increased threefold the opportunity for petitioner's conviction and invited and enabled the jury to return a conviction on the three failure to pay counts which should never have been before it.

The grant of certiorari thus becomes not only appropriate but imperative in order to evaluate the propriety and the implications of so patent a violation of Congressional and prosecutorial policy. Certainly, if the *Sansone* rationale—which reflects that policy—be applied to the facts of this case, the acquittal as to the felony charges would necessitate an acquittal as to the misdemeanor offense of failing to pay the taxes. The larger policy matters at issue here make it impossible to categorize this as a parochial case, limited to the particular facts or the particular prosecution. The ruling below and the very fact that this type of prosecution was initiated generate substantial questions meriting this Court's attention.

3. The decision below raises an important question of federal criminal procedure concerning the conditions under which a trial judge may refuse to change or amend an improper charge.

The Second Circuit has wrought a novel and important change in federal criminal procedure. It has held that a trial judge has discretion to refuse to alter an improper charge, despite timely objection thereto, if the objecting party failed earlier to submit a request for a proper instruction on the subject. And since this petitioner had not earlier requested an instruction as to the favorable inferences to be drawn from the evidence of late payments of his taxes, the trial judge was held to be within his discretion in refusing to alter

an erroneous instruction that such evidence could only be viewed as "not a defense to the charge contained in these counts." App. 1987a.

Such a decision creates an intolerable burden on counsel and renders deceptive and uncertain the present procedures for objecting to improper charges. No counsel can possibly anticipate all conceivable errors that a judge might make in his charge; some freedom has to be allowed to make objections after the charge has been delivered to cover the unanticipated errors. Indeed, the fair administration of criminal justice would seem to demand that the defense be allowed to make such objections at the end of a charge and to attempt to secure a proper instruction. Yet the Second Circuit's new rule would elevate the right to submit a proposed instruction into a condition precedent to making an objection following the charge—at least to the extent of permitting the trial judge, in his discretion, to ignore such an objection.

Such a decision is a clear departure from the decisions of this Court holding that either a request to charge or an exception to the charge as given is sufficient to put the trial court on notice and preserve the error for review on appeal. *Boyd* v. *United States,* 271 U.S. 104; *Lopez* v. *United States,* 373 U.S. 427, 436. And the ruling is inconsistent with the language and intent of Rule 30 of the Federal Rules of Criminal Procedure. That rule expressly provides that while any party "may file written request that the court instruct the jury on the law as set forth in the requests" such a party cannot assign as error "any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the

grounds of his objection." Nowhere does Rule 30 mention a request for an instruction as a condition to a party's right to object to a portion of the charge actually given by the judge.

Such a substantial innovation in criminal procedure should not be sanctioned without full consideration of the problem by this Court. The new procedure suggested by the Second Circuit can have an impact on all federal criminal trials, with repercussions in the civil trial area where similar rules as to requests and exceptions have heretofore prevailed. See Rule 51 of the Federal Rules of Civil Procedure.

The importance of this procedural question is made even more manifest when viewed in terms of the impact of the new Second Circuit rule on the development of the instant proceedings. The trial judge here gave an instruction that was manifestly improper, an instruction that the evidence as to the late payments of taxes by petitioner "is not a defense to the charge contained in these counts." Such a charge, by its failure to permit such evidence to be considered as indicative of the defendant's good faith, is reversible error under such decisions as *Berkovitz* v. *United States,* 213 F. 2d 468, 472 (C.A. 5); *United States* v. *McCormick,* 67 F. 2d 867, 870 (C.A. 2); *Heindel* v. *United States,* 150 F. 2d 493, 497 (C.A. 6); *United States* v. *Matot,* 146 F. 2d 197, 198 (C.A. 2); *Avera* v. *Florida Towing Corporation,* 322 F. 2d 155, 162, fn. 12 (C.A. 5); *Richardson* v. *Smith,* 102 F. 2d 697, 699 (C.A. 2); and *United States* v. *Gard,* 344 F. 2d 120, 121 (C.A. 2). And in this very case, the Second Circuit made no effort to justify or sanction the contested charge, or to deny petitioner's contentions respecting the charge, following full briefing and argument on these matters.

Instead, the Second Circuit ruled not only that petitioner's objection came too late but that the general charge to the jury, that it might consider all evidence before it on the issue of wilfulness, cured any possible prejudice. But the challenged instruction told the jury that it could not consider any evidence regarding late payments as "a defense to the charge"—thereby creating a critical exception to the general charge. Petitioner was thus forced into a position where (a) his objection to an improper charge was ignored on procedural grounds, (b) the improper charge was perpetuated, not being affected by the general charge, and (c) his right to have an appellate review and determination as to the improper charge was frustrated.

In these circumstances, review of the procedural morass created by the Second Circuit becomes appropriate.

CONCLUSION

For these various reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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